MACRO PROSPERITY SDN BHD v. CIMB BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS J
[CIVIL APPEAL NO: WA-12BNCVC-1-01-2016]
21 SEPTEMBER 2016

TORT: *Trespass – Tenancy – Factory rented to company – Company placed machine in factory – Bank debenture holder of machine – Company wound up and instructed to remove machine – Failure to remove machine despite extension of time – Whether bank was trespasser due to failure to remove machine – Whether liable to pay damages to landlord*

TORT: *Damages – Trespass – Tenancy – Factory rented to company – Company placed machine in factory – Bank debenture holder of machine – Company wound up and instructed to remove machine – Failure to remove machine despite extension of time – Landlord claimed against bank for rental and double rental – Whether there was tenancy agreement between landlord and bank – Whether landlord entitled to claim for double rental under s. 28(4)(a) of Civil Law Act 1956*

The plaintiff had rented out a factory to a company which was subsequently wound up. The company placed a machine in the factory and the defendant was the debenture holder of the machine. The plaintiff sent a notice to the defendant to remove the machine after the expiry of the tenancy of the factory. The machine was not removed despite an extension of time given by the plaintiff. The plaintiff gave notice that double rental was due by the defendant if the machine was not removed. There was still no removal after that date. At the Sessions Court, the plaintiff claimed against the defendant for normal and double rental. The Sessions Court held, *inter alia*, that (i) there was no tenancy agreement between the plaintiff and the defendant and, as such, the plaintiff was not entitled to claim for double rental under s. 28(4)(a) of the Civil Law Act 1956 ('the CLA'); and (ii) the defendant was a trespasser because it failed to remove the machine and was, therefore, liable to pay damages to the plaintiff. Despite finding the defendant liable, the Sessions Court only awarded the plaintiff with nominal damages. Hence, the appeal on damages by the plaintiff. The defendant cross-appealed against the findings of the Sessions Court that (i) it pay nominal damages; and (ii) it had trespassed the plaintiff's premises.

Held (dismissing plaintiff's appeal; allowing defendant's cross-appeal):

(1) The factory was rented out to another company after the tenancy with the wound up company expired and the plaintiff was paid a rate much higher than previously. There was no loss to the plaintiff. Therefore, it could not be said that the plaintiff suffered damages. (para 57)

(2) The plaintiff was not entitled to double rental from the defendant for holding over after the expiry or determination of the tenancy. It was never the case that the defendant was a tenant. The tenant was always

A the company that the plaintiff rented out the factory to which was subsequently wound up. For s. 28(4)(a) of the CLA to apply, there must be a tenancy agreement involving the defendant. The tenancy agreement was only between the plaintiff and the company and not involving the defendant at all. As such, the defendant was not liable to pay double
B rental. (para 45)

(3) The defendant was not a tenant nor could it be considered as holding over the factory. The defendant was only the debenture holder of the machine. The company that had rented the factory from the plaintiff was the one responsible for placing the machine in the factory. It was far too
C convenient for the owner of the premise to allege trespassing on any party who merely had its interest placed in that premise by another party who had, in fact, tenanted the same premise. The trespasser was actually the company that rented from the plaintiff, not the defendant. (para 47)

(4) The plaintiff was not without remedy. The plaintiff should have pursued
D its claim not with the defendant but with the liquidator of the company as the company that rented out the factory was already wound up. This was not done. The plaintiff could very well file its proof of debt with the liquidator to claim for the machine still being stored in the factory. This was more so when the machine was adjudged in law as still the
E property of the company. (paras 53 & 60)

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163
F *FC* ***(refd)***

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***

Johari Khalid & Anor v. Mohamed Zamri Khalid & Anor [1984] 2 CLJ 276; [1984] 1 CLJ (Rep) 170 FC ***(refd)***

Lee Guan Par v. Hotel Universal Sdn Bhd [2005] 3 CLJ 1 CA ***(refd)***

Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] 1 LNS 1416 CA ***(refd)***

G *Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor [2016] 6 CLJ 18 CA* ***(refd)***

Wee Tiang Yap v. Chan Chan Brothers [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433 FC ***(refd)***

Wong Yoon Yar v. Lin Yin Thai & Ors [1987] 1 LNS 21 SC ***(refd)***

H **Legislation referred to:**

Companies Act 1965, s. 236
Civil Law Act 1956, s. 28(4)(a)
Contracts Act 1950, s. 21

For the plaintiff - CW Beh; M/s Beh & Co
For the defendant - Choi Kian Yon; M/s Albar & Partners
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[Editor's note: Appeal from Sessions Court, Kuala Lumpur; Suit No: B52NCVC-65-03-2014.]

Reported by Najib Tamby

JUDGMENT

Abu Bakar Jais J:

Introduction

[1] This is an appeal only partly by the plaintiff against the decision of the Sessions Court after full trial. The Sessions Court, although finding the defendant liable, only awarded nominal damages to the plaintiff. Hence the plaintiff is appealing on damages awarded but not on liability.

[2] As reflected in the notice of cross-appeal, there is also a cross-appeal by the defendant appealing against the finding by the Sessions Court that it had trespassed the premises of the plaintiff and also an appeal against the order that the defendant pay nominal damages.

[3] This judgment discusses among others the scope of s. 28(4)(a) of the Civil Law Act 1956 ("CLA"), particularly whether it should be extended to a party that is not bound by a tenancy agreement. Also deliberated is the extent upon which a party can be considered a trespasser with regard to a premise owned by another. Also highlighted is the powers conferred on a liquidator based on the Companies Act 1965 ("CA') which is relevant to this case.

Background Facts

[4] The plaintiff owns a factory. It rented it out to a company which was subsequently wound up. The company placed a machine in the factory. The defendant is the debenture holder of the machine.

[5] Plaintiff sent a notice dated 20 November 2013 to the defendant to remove the machine after the expiry of the tenancy of the factory. The machine was not removed after 14 days from the date of the notice. The defendant asked for more time to remove the same, ie, until 5 January 2014. The plaintiff agreed and gave notice double rental is due by the defendant if the machine is not removed on that date. There was no removal even after that date. All letters between the plaintiff and defendant were written after the winding up of the company.

[6] The plaintiff claimed normal rental from the date of notice, 20 November 2013 to 5 January 2014, the last date to remove the machine. And double rental thereafter.

[7] The factory was rented out to a third party after the tenancy with the company ended.

Plaintiff's Submissions

[8] The arguments of the plaintiff for the appeal could be summarised as follows.

[9] The Sessions Court was wrong to conclude the plaintiff is not entitled to damages prior to 5 January 2014. The defendant is to benefit from its own wrong if damages are not awarded prior to that date. There is no tenancy agreement but the defendant should be liable for storage charges nonetheless.

[10] Damages should have been awarded based on the market value of the rent or storage charges adduced in court by the plaintiff and unchallenged by the defendant.

[11] The defendant's machine had substantially occupied a large part of the factory. With the machine unremoved, the factory could not be rented out in full and therefore the defendant ought to pay the full rent.

[12] Section 28(4)(a) of the CLA is applicable for plaintiff for double rental against the defendant for holding over. The provision should apply against a trespasser as the defendant was found to be by the Sessions Court. The provision also applies for holding over. The provision also allows the plaintiff to claim double rental as the defendant had wrongfully held over the factory. The defendant as an occupant of the factory and not just a tenant is also caught by the said provision.

[13] The plaintiff need not prove damages for trespass. The principle applicable is that the defendant should not benefit from its own wrongdoing. Double rental is applicable for the plaintiff as required by common law. The plaintiff had given sufficient reasons for the increase in rent.

[14] The Sessions Court failed to appreciate that it does not matter that the machine did not occupy the whole factory but was huge enough to cover a substantial part in the middle of the factory. Also wrong was the finding there were two lines of machines and not one line instead.

[15] It was wrong to find that the plaintiff did not give any explanation regarding the increase in the rent. The rent had already been reflected in the valuation report.

[16] Awarding nominal damages by the Sessions Court is clearly wrong. Full rental and subsequently double rent should be awarded to the plaintiff.

[17] Exemplary damages should be awarded because the defendant profited by selling the machine later but refused or failed to pay rental to the plaintiff.

[18] For the cross-appeal, the plaintiff says the machine was charged to the defendant, therefore it cannot deny it has the authority and power over the machine. The defendant also had written to the plaintiff that it will remove the machine.

Defendant's Submissions

[19] The arguments of the defendant for the appeal and its cross-appeal in gist is as follows.

[20] Since there was full hearing at the Sessions Court, the decision of the same therefore should not be easily disturbed as it had heard witnesses from both parties.

[21] The machine is owned by the company that rented the factory and not the defendant. The defendant is only the debenture holder of the same. It did not put the machine in the factory. It cannot be liable to pay rent.

[22] There is no tenancy agreement either verbally or in writing between the plaintiff and defendant. Therefore again the defendant cannot be liable to pay rent. The tenancy agreement was between the plaintiff and the company but not the defendant.

[23] The location of the machine does not greatly affect the total area of the factory as there were other machines not charged to the defendant. Despite the machine, the plaintiff was able to rent out the factory to a third party.

[24] The plaintiff's argument on entitlement for storage charges for the machine cannot stand as this was not pleaded and no evidence was led on this assertion.

[25] No rental should be imposed against the defendant as s. 28(4)(a) of the CLA applies only as against a tenant. The defendant is not a tenant under the said provision.

[26] The defendant is not a trespasser. The test whether the defendant is a trespasser was not carefully and sufficiently considered by the Sessions Court. The defendant cannot be a trespasser merely by writing to the plaintiff that it will remove the machine.

[27] The plaintiff amended its statement of claim to the effect that the defendant is not a licensee of the company that rented the factory. That would mean there is no longer an issue that the defendant is a trespasser. Evidence was adduced that the trespasser is the company and not the defendant as the company had placed the machine in the factory and not the defendant.

[28] The plaintiff had not adduced evidence that it suffered damages because of the action of the defendant. Damages have not been proven against the defendant.

[29] For the cross-appeal, the correspondence between the parties cannot be taken into account to find that the defendant had promised to remove the machine as the parties were under the mistaken fact that the machine was subject to a hire purchase agreement instead of just a debenture held by the defendant.

[30] There was misunderstanding also with regard to the letters between the parties that the machine occupied the entire factory when in actual fact only one line of machine was involved therein.

[31] Therefore the statutory provision of s. 21 of the Contracts Act 1950 with regard to an agreement being void because of mistake of fact is applicable for the defendant.

Sessions Court's Decision

[32] I would not be far off the mark if I were to explain that the salient findings and conclusions of the Sessions Court could be summarised as follows.

[33] The defendant is not the owner of the machine which was charged to the defendant by the company that was wound up and became the tenant of the plaintiff. The liquidator should have taken charge of the machine after the winding up of the company. It was this company that had placed the machine in the plaintiff's factory and not the defendant.

[34] The defendant is not a tenant of the plaintiff as there is no tenancy agreement between the two and as such no rental can be due to the plaintiff from the defendant. Thus, the plaintiff is not entitled to claim for double rental under s. 28(4)(a) of the CLA. The plaintiff cause of action for the recovery of rental ought to be by way of filing a proof of debt form with the liquidator.

[35] Since the defendant is not a trespasser onto the plaintiff's factory, the defendant is not obliged under the law to remove the machine.

[36] That the plaintiff failed to prove that it has suffered any damage arising from the purported breach of promise by the defendant to remove the machine.

[37] That the plaintiff's factory was rented out to a third party company. This showed that despite the machine, there was no hindrance for the plaintiff to have the factory rented out to another company and at a higher rental too.

[38] There is evidence that the plaintiff's factory was operational and two other companies had their business addresses registered at the very same address of the plaintiff's factory and had common directors with the company that had placed the machine that was requested to be removed.

[39] The defendant is a trespasser because it failed to remove the machine as agreed based on the correspondence sent to the plaintiff.

This Court's Findings

[40] Having noted the plaintiff's points of contention, the defendant's arguments and the decisions and findings of the Sessions Court, in turn the findings of this court with regard to the appeal and cross-appeal are narrated below. The relevant issues arising from the appeal and cross-appeal are also identified.

Reviewing The Sessions Court's Decision

[41] It is appropriate to explain at the very outset that the first fundamental duty of this court when hearing an appeal and cross-appeal from a lower court such as in the present case is to restrain from disturbing the findings of the Sessions Court without any good reasons. Unless there is a cardinal error on the part of the Sessions Court, there is no justifiable reason to simply overturn the evaluated and considered facts found by the same. This court could not simply replace the findings of fact already made by the Sessions Court with its own findings. This is especially true as the Sessions Court had been provided and had the benefit of hearing and assessing the witnesses of both the plaintiff and defendant, an opportunity not available to the appellate court such as this court now. There is a list of authorities on these principals as seen in the following cases. (See the Federal Court's cases of *Johari bin Khalid & Anor v. Mohamed Zamri bin Khalid* [1984] 2 CLJ 276; [1984] 1 CLJ (Rep) 170; [1985] 1 MLJ 142 and *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 527 and the Court of Appeal's case of *Tan Siew Sen & Ors v. Nick Abu Dusuki Hj Abu Hassan & Anor* [2016] 6 CLJ 18; [2016] 4 MLJ 602).

[42] However despite these cases, it is elementary to state that if the Sessions Court had misinterpreted the facts or law governing the issues it was asked to decide, it is incumbent on the appellate court to correct the error made. Or if the lower court had not fully appreciated the facts of the case brought before it, then it becomes the duty of the appellate court to rectify the mistake that has happened. (See the Court of Appeal's case of *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416; [2012] 4 MLJ 149).

[43] And in this appeal and cross-appeal, with respect, based on the reasons explained hereafter, the Sessions Court is found to be in error in law and fact only on the issue of the defendant being a trespasser and therefore liable to pay nominal damages.

The Scope Of s. 28(4)(a) Of The CLA

[44] As explained, a contentious issue pertaining to this case revolves around the applicability or extent of this statutory provision which states:

> Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

[45] This court cannot agree with the submission of the plaintiff that this provision means the plaintiff is entitled to double rental from the defendant for holding over after the expiry or determination of the tenancy. First this is because it was never the case that the defendant is a tenant. The tenant was always the company that the plaintiff rented out the factory to which was

A subsequently wound up. The defendant was only the debenture holder of the machine owned by the company. The tenancy agreement was only between the plaintiff and that company and not involving the defendant at all. For the provision to apply, there must be a tenancy agreement involving the defendant. Second, there is no issue of holding over as the defendant is not
B a tenant as explained. In the first place holding over can only be applicable by the plain reading of this statutory provision if the defendant is a tenant. At the risk of repetition, the defendant is not a tenant. As such the defendant is not liable to pay double rental.

[46] Also relevant to note is the case law submitted by the plaintiff
C purportedly to support its contention that this statutory provision allows double rental for the plaintiff. With respect these cases were submitted out of context as in these cases there was a tenancy established between the parties, a fact not proven in this appeal of the plaintiff now. These cases are *Wong Yoon Yar v. Lin Yin Thai & Ors* [1987] 1 LNS 21; [1987] 2 MLJ 714,
D *Wee Tiang Yap v. Chan Chan Brothers* [1984] 1 CLJ 156; [1984] 1 CLJ (Rep) 433; [1986] 1 MLJ 47 and *Lee Guan Par v. Hotel Universal Sdn Bhd* [2005] 3 CLJ 1; [2005] 4 MLJ 589. As these cases are different on facts, it is therefore distinguishable from the facts of the present case.

Whether The Defendant Is Trespasser

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[47] The defendant is not a tenant nor can it be considered as holding over the factory. The defendant only involvement as seen from the facts of this case is that it is the debenture holder of the machine. The company that had rented the factory from the plaintiff was the one responsible for placing the machine in that factory. The defendant in that sense cannot be found and
F considered as a trespasser. It is also far too convenient for the owner of the premise to allege trespassing on any party who merely had its interests placed in that premise by another party who had in fact tenanted the same premise. The trespasser if any in this case is the company that rented the factory from the plaintiff but not the defendant.

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[48] More so in this case when the defendant here is a bank only exercising its rights to the debenture on the machine. Finding it liable as a trespasser is not at all consistent with the need to promote business efficacy. It would not be too remote to note that a great obstacle bordering on total failure would be created in the operation of financial institutions such as the
H defendant if these institutions can be found to be trespassers. It is acceptable common practice for them to protect their interest by execution of the debenture in any tangible forms. And it is more often than not that these debentures are only pursued upon default of the financial facilities by the customers of the financial institutions, in this particular case the company
I that had the tenancy agreement with the plaintiff. It is the company that had placed the machine in the plaintiff's factory and to find the defendant is a trespasser because of the action of that company surely does not promote

healthy commercial development. For the reasons explained, it was wrong for the Sessions Court to find the defendant is a trespasser. Therefore this finding of the Sessions Court is set aside.

Can The Correspondence From The Defendant Stating It Will Remove The Machine Be Treated As The Same Being A Trespasser?

[49] There is no dispute that the letters sent by the defendant were sent by the defendant's previous solicitors. There is no dispute too that the relevant letters between the plaintiff and the defendant arose after the company was wound up. These letters no matter how conclusive it was written cannot bind the defendant if the law indicates the defendant is not a trespasser. And if the defendant is not a trespasser, it cannot be made liable to pay any damages including the nominal damages. Indeed in this regard the defendant cannot be held liable as trespasser as found by the Sessions Court because the machine in law still belongs to the company that rented the factory from the plaintiff. It is not the machine of the defendant despite the defendant having hold of the debenture on the machine. This finding is derived by analogy from the decision in the case of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516. In this case the relevant issue is whether the company that was wound up is still the owner of a piece of land which was charged to a bank. This position is quite similar to the present appeal before this court. The only difference of little consequence is the fact that in the present appeal the subject matter is the machine while in *Abric Project* it is the land. Deciding the company still owns the land, Ramly Ali J (now FCJ) explained:

> The legal title of the property remained with the respondent and was not affected by its winding up. Thus there was no necessity to vest the title of the property which was already in the name of the respondent. The said land was registered, at all material times, in the name of the first respondent. The sale and purchase agreement was therefore entered between the first respondent and second respondent. The liquidator signed the said agreement (SPA) in his capacity as liquidator appointed over the first respondent ie, as agent of the company and not in his personal capacity. The sale was conducted under s. 236(1)(c) of the Companies Act 1965.

[50] As seen, since this case is authority to find that the machine belongs to the company and not the defendant, it was with respect wrong for the Sessions Court to find the defendant is a trespasser as the letters indicate the defendant had agreed to remove the machine. No matter how clear the admission or agreement by the defendant that it would remove the machine by these letters, the fact remains the defendant in law is not the owner of the machine. As such the defendant cannot be a trespasser despite these letters. The nominal damages cannot therefore stand since the same was premised by the Sessions Court to be awarded because of what were said in these letters by the defendant. As such the finding that the defendant is a trespasser and that nominal damages be awarded against the defendant are both set aside.

Clauses Of The Debenture

[51] Without doubt the clauses of the debenture too indicate that the machine is owned by the company that rented the factory. Clause 3.1 of the same for example indicates that the borrower (meaning the company) is the beneficial owner of the machine. This is another indication that the defendant cannot be a trespasser in respect of the machine because the ultimate owner is not the defendant but the company.

Storage Of The Machine Not Pleaded

[52] Despite claiming that the defendant ought to pay storage charges for the machine that is left in the factory, there is no dispute that the plaintiff had not pleaded anything in relation to this issue of the storage of the machine. It is trite that any material facts particularly allegations on liability of another party must be pleaded, in this case by the plaintiff in its statement of claim. As this is not pleaded, this court could not be dealing and addressing on this point for the plaintiff's appeal.

The Correct Action And Remedy For The Plaintiff

[53] It is wrong to think that the plaintiff is without remedy. The plaintiff should have pursued its claim not with the defendant but with the liquidator of the company as the company that rented out the factory is already wound up. There is no dispute that this was not done. The plaintiff could very well file its proof of debt with the liquidator to claim for the machine still being stored in the factory. After all the liquidator is entrusted to manage the affairs of the company and in this regard to verify every claim by the creditors of the company and make payment accordingly including in this case the plaintiff's claim. This is more so when the machine is adjudged in law still the property of the company. In this regard s. 236 of the CA outlines the vast powers of the liquidator including making payment to any class of creditors and also making any compromise or arrangement for the benefit of parties having claims against the wound up companies. In fact there is evidence to suggest that the liquidator did sent a letter dated 20 November 2013 to the plaintiff's solicitors informing the same about filing the proof of debt if there is a claim from the plaintiff.

[54] Having failed to state its claim for the consideration of the liquidator, the plaintiff cannot under the circumstances of this case turn to the defendant to force responsibility for the placement of the machine by the company.

The Inconsistency Of The Sessions Court

[55] The Session Court had found the defendant both to be not a trespasser and trespasser. At first paragraph p. 11 of the written grounds, the Sessions Court's judge says the defendant is not a trespasser. But at last paragraph p. 19 of the same, she says the defendant is a trespasser because of what the defendant said in its letters which as explained, admitted the same would remove the machine.

[56] First, the inconsistency of the Sessions Court here means the decision of the same cannot stand as there cannot be two different findings on the same issue and fact. Second, as pointed out these letters were written after the company that rented the factory was wound up. The liquidator then had taken over the conduct of the company. And as explained, what should be done by the plaintiff is to state its claim for the consideration of the liquidator instead of suing the defendant. Third, also as explained, no matter how strong the letters were worded, it cannot override the fact that in law the defendant is not a trespasser.

No Damages Proven

[57] It is a fact that the factory was rented out to another company after the tenancy with the wound up company expired and the plaintiff is being paid RM18,000, a rate much higher that previously. There was no loss to the plaintiff. Therefore it cannot be said that the plaintiff suffered damages.

[58] It is incumbent on the plaintiff to prove damages but unfortunately this is not the case here as the plaintiff as explained, was able to rent out the factory without any loss and with handsome returns. Arifin Zakaria CJ in the Federal Court's case of *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269 said:

> The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. The burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him (s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action. Therefore, in a claim for damages, it was not sufficient for the plaintiff to merely state the amount of damages that he claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court.

The claim by the plaintiff herein was for general and special damages arising out of a breach of contract and/or negligence. Therefore, the burden rested on the plaintiff to prove the damages. It was not sufficient for the plaintiff to merely assert that he suffered such damages without proving it.

Conclusions

[59] The relevant issues, facts and law highlighted in this judgement would be sufficient to explain the decision of this court regarding the appeal and cross-appeal. There is no reasons to deal with all the points of arguments by both parties as the issues which are elaborated in this judgment in any event would show that the plaintiff's appeal is without merits and on the other hand because of the facts of this case and the position of the defendant, the cross-appeal is justifiable.

A **[60]** The plaintiff's action against the defendant cannot stand as the latter is not the tenant of the factory. The defendant too cannot be a trespasser as the trespasser if any would be the company that had tenanted the factory from the plaintiff. The plaintiff should have filed its claim with the liquidator of the company since the company has already been wound up.

B **[61]** The defendant is only a bank holding a debenture on the machine. The machine is still owned by the company. The defendant did not place the machine in the factory. It cannot therefore be a trespasser and hence should not be liable to pay any damages.

C **[62]** Based on all the reasons as explained, the appeal of the plaintiff is dismissed and the cross-appeal of the defendant is allowed with costs for the defendant.

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